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Issue date: 02Oct2001

CASE NO.: 1998-LHC-1663

OWCP NO.: 07-146539

IN THE MATTER OF

AUGUST CHERAMIE,
Claimant

v.

FOURCHON WELDING CONTRACTORS,
Employer

and

LOUISIANA WORKERS' COMPENSATION CORPORATION,
Carrier

DECISION AND ORDER ON REMAND

On April 20, 2001, the Board remanded this case for consideration of whether Employer presented sufficient evidence to rebut the Section 20(a) presumption that Claimant's present back condition was causally related to his work accident of August 22, 1997, and if so, to resolve the issue of causation on the basis of the record as a whole so as to determine whether Claimant's ongoing back complaints are work related. Following this analysis the Board stated:

> The next step involves determining the extent of physical impairment resulting from claimant's work-related condition. A claimant is considered permanently disabled if he has any residual work-related impairment after reaching maximum medical improvement. The extent of disability is evaluated on the basis of both physical and economic factors. To establish a *prima facie* case of total disability, claimant must demonstrate that he cannot return to his usual employment due to his work related injury. The burden then shifts to employer to establish the availability of suitable alternate employment.

Cheramie v. Fourchon Welding Contractors, Inc., BRB No. 99-0532, pp. 4-5 (DOL Ben.Rev.Bd. April 20, 2001)(citations omitted).

The Board further noted that if I concluded that Claimant had a permanent work-related physical impairment, which restricted his capabilities, i.e., his ability to perform his past work for employer, I was entitled to reaffirm my previous determination that Claimant established a *prima facie* case of total disability and thus was entitled to an award of permanent total disability benefits inasmuch as Employer did not contest my finding that Employer failed to establish suitable alternative employment. Thus, the Board remanded the case with the following instructions: 1) determine whether Employer produced sufficient evidence to rebut the Section 20(a) presumption, and if so, to resolve the issue of causation on the basis of the record as a whole; and 2) if the Employer has not met the burden of rebutting the Section 20(a) presumption, or if the record as a whole establishes Claimant's condition is causally related to his work, then I am to determine the extent of the physical impairments resulting from Claimant's work related condition.

I. DISCUSSION

1. Section 20(a) Presumption

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2000); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995); *Addison v. Ryan Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 101 (1986). To rebut the Section 20(a) presumption, the Employer must present substantial evidence that a claimant's condition is not caused by a work accident or that the work accident did not aggravate clamant's underlying condition. *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966); *Kubin*, 29 BRBS at 119.

In the case of *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999), the Fifth Circuit affirmed a determination by the ALJ that an employee's current impairment was caused by his employment even though the employee had received the same injury at an earlier job. Vina, the employee, had injured his neck and back in 1986. *Id*. at 192. In 1988 he began working for Vessel Repair, Inc., and in 1992, while performing welding work, he fell and re-injured his back and neck. *Id*. When comparing x-rays from Vina's 1986 injury and his 1992 injury, Dr. Teuscher opined that the x-rays showed no difference, and thus, Dr. Teuscher concluded that "there was no objective basis for different employment

restrictions before and after the accident." *Id*. A second doctor, however, testified that "while he could not apportion causation of permanent disability between the 1992 injury and Vina's prior condition, each was a cause; . . ." *Id*. Predictably, Vessel Repair, Inc., contended that any disability Vina had was due solely to his 1986 injury. *Id*. at 193. The Fifth Circuit determined, apart from the medical testimony, that since the ALJ credited Vina's testimony that his present pain was greater than that suffered before the 1992 injury, the court was bound to affirm the decision because the ALJ's determination was based on substantial evidence, especially since a second doctor had opined that Vina's 1992 injury was *a* cause of his current disability. *Id*. at 194.

A. Establishing the Presumption

To establish the right to invoke the Section 20(a) presumption, Claimant must show that he suffered some harm or pain as a result of a work related accident or as a result of working conditions. *Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687 (5th Cir. 1999); *Merril v. Todd Pacific Shipyards Corp*., 25 BRBS 140, 144 (1991).

The August 22, 1997 injury occurred when Claimant was moving angle irons by hand. (Tr. 25). Claimant felt a "pop" in his back which caused him to fall to his knees. *Id*. After taking a few days off, and after attempting to work in pain, Employer sent Claimant for a medical evaluation. (Tr. 29). Accordingly, since Claimant established that his August 22, 1997 injury occurred at work, he is entitled to the Section 20(a) presumption that his current condition is caused by his work related injury.

B. Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc.*, 194 F.23d at 687-88 (citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Conoco, Inc., v. Director, OWCP,* 194 F.3d 684, 690 (5th Cir. 1999)(stating that the hurdle is far lower than a "ruling out" standard).

Like in *Vessel Repair, Inc.*, 168 F.3d at 192, where the employer introduced medical reports to show that there was no difference between Vina's pre and post accident impairments to rebut the Section 20 presumption, here, Employer introduced the report of Dr. Landry with whom Claimant sought medical treatment after his August 22, 1997 work-place accident. When Claimant visited Dr. Landry on September 29, 1997, Claimant denied ever having back problems. (EX 4). A physical exam revealed a marked lumbar spasm, "absent left ankle jerk," weakness in extending the left great toe, numb toes, and positive straight leg raising at thirty degrees on the left side and negative on the right side. *Id*. Dr. Landry further opined that there were no abnormalities revealed by an X-ray of the lumbar spine other than mild changes due to Claimant's fifty-one years of aging. *Id*. Dr. Landry's diagnosis was a bulging disk. *Id*. By November 17, 1997, Dr. Landry opined that Claimant still had some tightness in his back, but, he could not feel an actual spasm. *Id*. Dr. Landry also recommended that Claimant return to his regular employment, and placed no work restrictions on Claimant. *Id*. Therefore, Employer presented substantial evidence to rebut the Section 20(a) presumption that Claimant's current physical condition is causally related to his work place accident on August 22, 1997 because Dr. Landry reported that on November 17, 1997, Claimant was able to return to work and opined that Claimant had no abnormalities that would cause Claimant's present allegations of physical impairment.

C. Causation on the Basis of the Record as a Whole

(*i) Pre-Employment Medical Conditions*

Claimant had an extensive medical history prior to his work related accident on August 22, 1997. In 1992 he suffered a heart attack, and endured angioplasty four months later. (Tr. 58). At a pre-employment examination in February of 1995, Dr. Sam Logan remarked that Claimant had a "narrow disk T12, L1 with fusion," and remarked that Claimant was at "[r]isk for constant lifting over 50 lbs." (EX 6). In July 1995, Dr. Eddie Smith declared that Claimant was permanently and totally disabled as a result of coronary artery disease, ischemic cardiomyopathy, hyperlipidemia, diabetes mellitus, chronic hypertension, chronic bronchitis, hypothyroidism, reflux esophagitis, and morbid obesity. (EX 3). Also, in March of 1996, Claimant was referred by Louisiana Rehabilitation Services to Dr. Logan who diagnosed Claimant as having a back impairment, cardiovascular disease and diabetes mellitus. (EX 7). In his functional capacity exam Claimant exhibited poor physical endurance, but noticeably, the exam did not mention back pain, rather the report stated that Claimant had "slow movement and limping on the left lower extremity with walking greater than 1/8 of a mile," and recommended that Claimant could lift light weights at a sedentary work level. (EX 7). Jeffrey Matherne, a rehabilitation counselor, rated Claimant as Selection Group II,

severely disabled. (EX 8). Claimant was not rated in Selection Group I, the most severely disabled. *Id*. Prior to injuring his back in 1997, Claimant had never taken any medication for his back. (Tr. 74).

In July 1996, Claimant met with Allen Crane, a licensed vocational rehabilitation specialist, who asked questions regarding Claimant's back. At the hearing, Claimant stated:

Q: Do you remember telling [Allen Crane] that you've always had problems - - troubles with your back?

A: I said I had back aches. Like normal - - like other people have when they do - - overdo too much.

Q: Okay.

A: That's all. But I never had any severe back trouble. I never went to the doctor for it. . . .

Q: You told him you couldn't walk more than 400 feet without taking a break. Right?

A: Well, when I have to had (sic) my heart attack, yes, that's all. After all I had my heart attack, that's what I went through - - that test. That's what - - he came in - - whatever his name is - - he came into the equation after I had my heart attack. That's - - I couldn't do none (sic) of that. All that you're saying now, I couldn't do none (sic) of that after I had my heart attack. Right.

(Tr. 60-61). *See also*, (Tr. 74)(stating that Claimant was not taking any back medication before going to work for Employer).

Similar to *Vessel Repair, Inc.*, 168 F.3d at 192, where Vina had suffered head and neck trauma before his work-place accident, but was able to perform his job functions subsequent to that injury, so too did Claimant, despite his physical restrictions, and ratings of "severely disabled," gain new employment in 1996, as a captain for G&A Barge Company. (TR. 17). Claimant continued in this employment for one and a half years, terminating his employment only when G&A ceased operations. (Tr. 19). Also, Claimant began working for Employer in May 1997, and was able to perform his job functions before his August 22, 1997 back injury.

(*ii) Current workplace injury*

Claimant's injury occurred when he was moving heavy, thirty-foot long, pieces of iron. (Tr. 26). Regarding the injury, Claimant stated:

THE WITNESS: I felt a pop in my back and I went down to my knees.

JUDGE KENNINGTON: Okay.

THE WITNESS: And I stayed there for maybe 20, maybe 30 minutes before somebody else came into the yard. And when he came he helped me get up. But I couldn't stay up so he helped me sit back down and then I said, Just wait awhile.

(Tr. 26-27).

By the time Claimant made it to the safety office the proper personnel had already left for the day. (Tr. 27). Claimant's supervisor then recommended that Claimant rest over the weekend and apply a heating pad to his back. *Id*. Claimant returned to work the following week, but, he was unable to perform his job. (Tr. 28). On Thursday, Claimant went to a doctor, and subsequently made an appointment with Dr. Landry, an orthopedic specialist. (Tr. 29-32). Regarding his treatment with Dr. Landry, Claimant testified:

Q: How long did Dr. Landry treat you, Mr. Cheramie?

A: I don't remember the exact date that we - - it was on a Monday. Maybe three weeks - - four weeks?

Q: All right. Did you express any relief from the particular treatments?

A: No. He sent me to get an epidural, and I thought about maybe two days it did some good. And after that, I went back to the same thing again.

Q: Back to the same thing, as meaning what?

A: Pain in my back and my lower back and can hardly move around. . . .

Q: Did you ever question Dr. Landry's release of you to return to work?

A: Yes, sir.

Q: And that was because you were still in pain?

A: Yes, sir. . . .

Q: When you were discharged by Dr. Landry to return to work, did he tell you it was for light duty?

A: He didn't tell me. He just told me to go back to work.

(Tr. 34-35).

Claimant's physical therapist remarked on November 7, 1997 that Claimant "continued to experience numbness" in his left foot and had "significant pain" in his lumbar musculature. (EX 4). On November 14, 1997, Claimant's physical therapist again noted that Claimant continued to experience pain. (EX 4). Indeed, when Dr. Landry released Claimant to go back to work on November 17, 1997, he noted that Claimant still had tightness in his back. (EX 4).

Unable to understand why Dr. Landry released him to return to work, and prior to hiring an attorney to advance his claim, Claimant telephoned David Lorino, a senior claims representative with LWCC. (Tr. 45). Claimant called Mr. Lorino because Dr. Landry led him to believe that the insurance company no longer wanted to pay for his medical bills. (Tr. 46). Claimant testified:

A: . . . And I called Dr. - - Mr. Lorino, and me and him (sic) got into it on the phone. And I told him, I said, I can't believe that you are doing this to me.

He said, Well - - he said, Look - - he said, We got to abide by what the doctor tells us to, or whatever - - something like that.

(Tr. 44).

(iii) Present Physical Condition

At the hearing on November 23, 1998, Claimant testified that he "can hardly move around." (Tr. 34). Claimant's condition prohibits him from undertaking any heavy lifting, (Tr. 66), and results in an inability to sit for long periods of time. (Tr. 68) Continuing complaints about pain in his back are corroborated by the reports of Claimant's physical therapist who noted that Claimant experienced continuous pain on two separate occasions, and by Dr. Landry's statement that Claimant continued to experience some tightness in his back. (EX 4). Claimant is currently employed as a "hot shot" driver, transporting work crews to and from work sites, making ten to eleven dollars per trip, (Tr. 70-71), but, he is only able to perform this work two or three times per week because of his back pain. (Tr. 68-69). Claimant further testified that his back pain prohibits him from making any round-trip over eighty miles because he cannot sit for very long. (Tr. 68-70). Thus, Claimant's subsequent activities corroborate his testimony that his back problems prohibit him from functioning at any sustained task. Also, on the date of the hearing, Claimant testified that he continued to have problems with his heart and chest, and continued to undergo treatment for those conditions at Louisiana Chabert. (Tr. 75-76).

(iv) Distinguishing Past and Present Impairments

The record reveals that Claimant had medical problems prior to his August 22, 1997 injury, but, those problems were not primarily related to Claimant's back. Also, the prior categorization of Claimant

as "severely disabled," or "permanently and totally disabled," do not reflect the true nature of Claimant's physical condition before August 22, 1997, because Claimant was able to effectively function for a year and a half as a barge captain and he was able to function under the direction of Employer for at least four months in 1997. Similar to the employee in *Vessel Repair, Inc.*, Claimant was able to function with pre-accident impairments, but, the work related accident, Claimant is not able to function at any sustained task.

Also, like the court in *Vessel Repair, Inc.*, I credit Claimant's testimony and find that Claimant's current physical impairments are worse than the incapacity that Claimant had prior to August 22, 1997. In this regard, I find that Dr. Landry's decision to release Claimant without any work restrictions was in err because Claimant's credible testimony was that he was unable to work because of continuing back pain, and this finding is corroborated by the reports of Claimant's physical therapist, Claimant's expression of disbelief to Mr. Lorino, and the subsequent event of Claimant being unable to secure any meaningful employment because he cannot lift heavy weights and cannot sit for very long. Therefore, based on the record as a whole, the testimony of the parties, the witness's demeanor, I find that Claimant's current condition is causally related to his work related accident on August 22, 1997, and that his current impairment is greater than that suffered before his 1997 injury.

2. Nature & Extent of Physical Impairment

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2000). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). *See Owens v. Traynor*, 274 F. Supp. 770, 774 (D. Md. 1967), *aff'd* 396 F.2d 783 (4th Cir. 1968). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). A claimant establishes a *prima facie* case of total disability by showing that he cannot return to his former employment. *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). To rebut the presumption of total disability the Employer must show suitable alternative employment. *P&M Crane Co. V. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991).

A. Date of Maximum Medical Improvement and Lingering Impairments

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached

so that a claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp*., 903 F.2d 168, 170 (2nd Cir. 1990); *Sinclair v*. *United Food & Commercial Workers*, 23 BRBS 148, 156 (1989). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18, 21 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446, 447 (1981).

Here, the parties stipulated that Claimant reached MMI on November 17, 1997. Additionally, I find that Claimant has a lingering disability because I credit Claimant's testimony that the pain in his back prohibits him from any sustained employment, and this testimony is collaborated by the fact that: Claimant's physical therapist noted that Claimant experienced continuous pain in his back on two separate occasions; Dr. Landry noted that Claimant had tightness in his back prior to releasing Claimant; and Claimant only has a limited use as a "hot-shot" driver because his impairment prohibits him from lifting heavy objects, and prohibits him from sitting for too long. As discussed, *supra*, part 1(C)(iv), Claimant's 1997 injury resulted in physical impairments that are different, and more extensive, than any of his pre-1997 impairments, thus, his lingering disability is not a sole result of any prior condition. Claimant's condition is permanent because he no longer undergoes treatment with a view for improvement. (Tr. 75)(stating that Claimant only back medication is ibuprofen). Therefore, Claimant has a permanent disability because he has reached MMI, has a lingering disability, and is no longer undergoing treatment with a view for recovery.

B. Unavailability of Former Job and Suitable Alternative Employment

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *SGS Control Serv*. *v*. *Director, Office of Worker's Comp*. *Programs*, 86 F.3d 438, 444 (5th Cir. 1996); *P&M Crane Co. V. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89, 91 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986).

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v*. *Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *Palombo v*.

Director, OWCP, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Vessel Repair, Inc.*, 168 F.3d at 194 (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job).

After the original hearing, I determined that due to Employer's failure to make Claimant's previous job available to him, he was unable to return to his previous longshore position following his work related injury. Decision and Order at 10; (Tr. 36). Even if Employer had made Claimant's job available, I find that Claimant could not return to his former employment. Claimant testified concerning the requirements of his job:

> JUDGE KENNINGTON: And what type of work did you do at the shipyard?
>
> THE WITNESS: Well, they started it out, it was supposed to be just sitting at the desk and do paperwork, you know. . . . But then I had to take care of the pipe yard and steel yard. I had to move, you know, with the forklift and move things around, when the forklift broke down, I had to start doing it by hand. . . . And moving the pipe and stuff around, you know, angle iron and stuff, we had to move them from one place to another.
>
> JUDGE KENNINGTON: How did you move the angle iron from place to place?
>
> THE WITNESS: . . . [W]e carried it by hand sometime. And, you know, sometime we - - if it was a whole bunch, like a whole pack of it, they'd have to use a forklift to move it after that. . . . Some of them you had to move from one section to another, you just move it over, like if it was in the wrong stack, you had to move it to another stack, you just picked it up and moved it over.

(Tr. 20-21).

As noted, *supra*, part 1(C)(iii), Claimant's current condition is such that he cannot do any heavy lifting, cannot sit for long periods of time, and cannot perform any sustained task. Clearly, Claimant cannot perform his former job. His conditions prohibit him from being a five-a-day worker. Such a finding is consistent with Claimant's limited job as a "hot shot" driver. In his present employment, Claimant does not work more than three days a week, and cannot drive over eighty miles round trip. A finding that Claimant cannot perform his former job is also corroborated by the physical therapist's indication that Claimant experiences continuous pain in his back. Similarly, Dr. Landry noted that Claimant complained of continuing pain prior to his release. Furthermore, Claimant's subsequent actions of speaking with Mr.

Lorino, and in working at a job that only pays up to thirty dollars a week, also substantiates the truthfulness of Claimant's complaints. Accordingly, I credit Claimant's testimony and find that Claimant is unable to perform his former job because he cannot lift heavy objects, sit for long periods of time, or perform any sustained task.

Also, as noted by the Board, my previous finding that Employer did not establish suitable alternative employment was not contested on appeal, thus, satisfaction of Claimant's *prima facie* case establishes his entitlement to permanent total disability benefits. *Cheramie*, BRB No. 99-0532, p. 6 n.6. Therefore, Claimant is totally disabled within the meaning of the Act because Claimant suffered a workplace injury that was a cause of his current impairment, Claimant reached MMI with a lingering disability, Claimant's physical condition would not allow him to return to his former employment, and Employer did not show suitable alternative employment.

II. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267, 270-71 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20, 22 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

III. ATTORNEY FEES

No award of attorney's fees for services to the Claimant on remand is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet

showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

IV. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act from August 29, 1997, until November 17, 1997. Compensation shall be based on an average weekly wage of $210.00 and a corresponding minimum compensation rate of $200.17 pursuant to Section 906(b)(2) of the Act.

2. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908(a) of the Act from November 18, 1997, and continuing. Compensation shall be based on an average weekly wage of $210.00 and a corresponding minimum compensation rate of $200.17.

3. Employer shall be entitled to a credit in the amount of $1,029.96 for temporary total disability compensation previously paid to Claimant.

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 1997, for the applicable period of permanent total disability.

5. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

6. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

7. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A
CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE